United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada, Local Union No. 305, AFL–CIO *and* Abington Constructors, Inc. Case 34–CD–46

June 30, 1992

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

The charge in this Section 10(k) proceeding was filed May 13, 1991,[1] by Abington Constructors, Inc. (the Employer) alleging that the Respondent, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada, Local Union No. 305, AFL–CIO violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to the Employer's unrepresented employees. The hearing was held June 7, before Hearing Officer Gail R. Moran.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a New Hampshire corporation with its principal place of business located in Portsmouth, New Hampshire, is engaged in the business of construction. During the 12 months preceding the hearing, the Employer performed services outside the State of New Hampshire valued in excess of $50,000, and purchased and received materials valued in excess of $50,000 from points located outside the State of New Hampshire. At the time of the hearing, the Employer was performing a job in Preston, Connecticut, valued at approximately $2 million. Accordingly, we find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent admitted, and we find, that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

On March 20, the Employer assigned to its unrepresented employees the work of installing large and small-bore pipe at a waste energy facility in Preston, Connecticut. Since March 25, and continuing through the date of the hearing, the Respondent has been picketing the Preston jobsite.[2] At the time of the hearing, the Employer estimated that the job was 40 percent complete.

On May 8, the Employer's construction manager, John DeStefano, met with the Respondent's business agent, Cameron Champlin, at a local restaurant. DeStefano asked how long the picketing would continue and Champlin replied that the picketing would continue until the Employer hired the Respondent's men under an agreement. Champlin said that his men were good and productive workers and had worked in Connecticut on various jobs. DeStefano said that maybe he could consider them on other projects down the road, but not for this project. When DeStefano again asked how long the picketing would continue, Champlin said that the picketing would continue ''until the garbage trucks came.'' DeStefano explained that the garbage trucks come to the site at the point when the facility is completed and operational. Champlin again requested that the Employer hire some of his men on the job. DeStefano again replied that that was not going to be possible.

B. *Work in Dispute*

The disputed work involves the installation of prefabricated large-bore pipe, fabrication and installation of small-bore pipe, and installation of processing equipment at the waste-to-energy plant construction project in Preston, Connecticut.

C. *Contentions of the Parties*

The Employer contends that there is reasonable cause to believe that the Respondent violated Section 8(b)(4)(D) of the Act by picketing the Preston jobsite in order to force the Employer to reassign the disputed work to employees represented by the Respondent, and that the Board must therefore determine the merits of the dispute. It further contends that the work in dispute should be awarded to its unrepresented employees on the basis of the Employer's preference and past practice, the skills of its employees, and economy and efficiency of operations. Finally, the Employer asserts that the Respondent never communicated a disclaimer of its interest in the disputed work to the Employer.

The Respondent maintains that no jurisdictional dispute exists because it made no demand for the work in question, has disclaimed any interest in the work, and has been picketing in protest of the Employer's failure to pay its employees area standard wages and benefits.

[1] All dates are in 1991 unless otherwise indicated.

[2] Employer witness John DeStefano testified that the Respondent's picket signs read: ''Abington paying substandard wages.''

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for the voluntary adjustment of the dispute.

As discussed above, testimony was presented at the hearing that the Respondent claimed that the installation of the large and small-bore pipe at the Preston jobsite should be reassigned to employees represented by the Respondent, and picketed the jobsite in order to obtain that work. According to DeStefano, the Respondent's business agent demanded the work and indicated that the picketing would continue until his men were hired under an agreement.

The Respondent asserts that it did not engage in prohibited conduct or even make a demand for the work, but it failed to produce witnesses to testify in this proceeding.[3] The Respondent did make an offer of proof that if Champlin were to testify he would testify that at no time has the Respondent made any demand for the work in dispute. In a 10(k) proceeding, the Board is not charged with finding that a violation did in fact occur, but only that reasonable cause exists for finding a violation. Thus, a conflict in the testimony need not be resolved in order for the Board to proceed to a determination of the dispute. *Laborers Local 334 (C. H. Heist Corp.)*, 175 NLRB 608, 609 (1969). Even if we were to accept the Respondent's offer of proof, we would find, based on the record before us, that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for the voluntary adjustment of this dispute. We accordingly so find.

We also find that the Respondent's purported disclaimer is ineffective. At the hearing, the Respondent's counsel asserted in his closing statement that ''the Union is not seeking the work of this employer at the—any work of this employer at the Preston, Connecticut, facility.'' The Respondent did not disclaim this work prior to the hearing[4] and the picketing continued throughout the hearing. Under these circumstances, we conclude that the declaration ''the Union is not seeking the work of this employer'' is ''part of the Union's denial that its object in picketing was the unlawful one of forcing a particular work assignment.'' *Operating Engineers Local 369 (Austin Co.)*, 255 NLRB 476, 478 fn. 1 (1981). Accordingly, we find that the Respondent's counsel's statement was simply a denial that the Respondent was seeking the work rather than a disclaimer of any interest in performing it.

The Respondent maintains that the object of its picketing was to protest the Employer's failure to pay its employees the prevailing wage. Even assuming that one object of the Respondent's picketing was to protest the Employer's wage rates, we have already determined that another object of the picketing was to force the Employer to assign the disputed work to employees represented by the Respondent. Because ''[o]ne proscribed object is sufficient to bring a union's conduct within the ambit of Section 8(b)(4)(D),''[5] we find that the dispute is properly before the Board for determination under Section 10(k) of the Act.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB (1962).

The following factors are relevant in making the determination of the dispute.

1. Certification and collective-bargaining agreements

The Employer has no history of collective bargaining with the Respondent or any other labor organization and has no contract with either group of employees. Therefore, this factor does not favor an award of the disputed work to either the employees represented by the Respondent or to the Employer's employees.

2. Employer preference and past practice

DeStefano testified that the Employer prefers that its unrepresented employees perform the disputed work. He also testified that similar work has historically been performed by the Employer's employees on jobsites in other states. Accordingly, we find that the factor of employer preference and past practice favors an award of the disputed work to the Employer's employees.

3. Area and industry practice

No evidence was presented regarding the area and industry practice. Accordingly, we find that this factor

[3] The Respondent requested a postponement of the hearing so that it could arrange for Business Agent Cameron Champlin to testify. In light of the fact that the Respondent had adequate notice of the time and place of the hearing, the hearing officer properly denied the Respondent's request.

[4] DeStefano testified that he was not aware that the Respondent had disclaimed any interest or right to perform the work at the Preston facility.

[5] *Cement Masons Local 577 (Rocky Mountain Prestress)*, 233 NLRB 923, 924 (1977).

does not favor awarding the work to either group of employees.

4. Relative skills

The Employer presented evidence that its employees possess the skills required to perform the work in dispute and that the Employer and general contractor have been satisfied with the performance of the Employer's employees on the job. The Respondent presented no evidence regarding the relative skills of the employees it represents. Accordingly, we find that this factor favors an award of the disputed work to the Employer's employees.

5. Economy and efficiency of operations

DeStefano testified that it is more efficient and economical to use its own employees, who are trained and certified to perform the work in dispute, than it would be to employ employees represented by the Respondent. DeStefano contends that training the employees represented by the Respondent to perform the disputed work would be a great expense to the Employer and would result in lost time on the job. These expenses and delays could also cause the Employer to fail to meet the completion schedule set by the general contractor.

Based on the testimony presented, we find that this factor favors awarding the disputed work to the Employer's employees.

Conclusions

After considering all the relevant factors, we conclude that employees of the Employer are entitled to perform the work in dispute. We reach this conclusion relying on the Employer's preference and past practice, relative skills of the Employer's employees, and economy and efficiency of operations. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Abington Constructors, Inc. are entitled to perform the installation of prefabricated large-bore pipe, fabrication and installation of small-bore pipe, and installation of processing equipment at the waste-to-energy plant construction project in Preston, Connecticut.

2. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada, Local Union No. 305, AFL–CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Abington Constructors, Inc. to assign the disputed work to employees represented by it.

3. Within 10 days from this date, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada, Local Union No. 305, AFL–CIO shall notify the Regional Director for Region 34 in writing whether it will refrain from forcing Abington Constructors, Inc., by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.